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No. 96-667

In The

Supreme Court of the United States

October Term, 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

ROBERT E. HYDE,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the district court can accept a criminal defendant's tendered guilty plea, thus binding the defendant to the plea, without first, or simultaneously, accepting the plea agreement upon which the plea depends.

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The published decision of the United States Court of Appeals for the Ninth Circuit was filed on April 30, 1996, and was initially reported at 82 F.3d 319. As amended and superseded on denial of rehearing the opinion is republished at 92 F.3d 779. Petition for Writ of Certiorari ("Pet.") App. 1a-7a. The district court's unpublished order denying respondent's motion to withdraw was filed on July 19, 1994. Pet. App. 8a-18a.

RULES INVOLVED

Rules 11 and 32 of the Federal Rules of Criminal Procedure and Section 6B1.1, p.s., of the United States Sentencing Guidelines are involved in this case, and are reproduced as an appendix to petitioner's brief on the merits. Pet. Brf. 1a-14a. Relevant portions of the 1966 and 1975 texts of Rules 11 and 32, and the Notes of the Advisory Committee on Rules regarding the 1974 Amendments of those rules, are appended to this brief at App. 1-10.

STATEMENT OF THE CASE

Respondent's direct appeal followed a guilty plea on federal criminal charges alleging mail and wire fraud and arose out of his conviction and the 30-month sentence imposed under the Sentencing Guidelines.

An eight-count indictment, filed in the Northern District of California on December 13, 1991, charged respondent with three counts of mail fraud, in violation of 18 U.S.C. § 1341 (Counts One, Four and Five); two counts of receipt of stolen property which had crossed a state boundary, in violation of 18 U.S.C. § 2315 (Counts Two and Three); and three counts of wire fraud, in violation of 18 U.S.C. § 1343 (Counts Six, Seven and Eight). J.A. 5-13.

On November 29, 1993, respondent entered into a plea agreement with the prosecutor and tendered a guilty plea to two counts of wire fraud (Counts One and Four) and two counts of receipt of stolen property (Counts Two and Three). J.A. 53-54. The district court, however, deferred acceptance of the plea agreement until after review of the Presentence Report. J.A. 54.

Pursuant to the plea agreement and in exchange for respondent's guilty pleas to Counts One through Four, the government agreed to move to dismiss Counts Five through Eight of the indictment and not to bring further charges against respondent in connection with his involvement with two loan brokerage firms. J.A. 21-22. The government also stipulated to sentencing calculations for respondent's base offense level, the grouping of offenses, role enhancement, and respondent's adjusted offense level. J.A. 23-24. The agreement also provided how restitution would be calculated. J.A. 24. Finally, the parties agreed the sentencing stipulations were not binding on the district judge: "The district court will be free to make its own determinations pursuant to the Guidelines as to the appropriate sentence to be imposed." J.A. 25.

The agreement stated that it was made under Federal Rule of Criminal Procedures 11(e)(1)(B).[1] J.A. 21. As the agreement required that the government dismiss charges, it was also a Rule 11(e)(1)(A) agreement.

On December 23, 1993, less than a month after the change of plea hearing and before having seen his presentence report, respondent moved to withdraw his guilty plea on the grounds both that the agreement was made under duress and that the district court failed properly to advise him of the consequence of his plea, as required by Fed. R. Crim. P. 11(e)(2). J.A. 56-57. The district court held an evidentiary hearing on June 2, 1994, and denied the motion to withdraw the guilty plea in a written order dated July 19, 1994, finding that respondent had failed to show that his guilty plea was coerced. J.A. 6, 70-73.

On February 28, 1995, the district court sentenced respondent to a 30-month term of imprisonment consisting of concurrent 30-month terms on each of Counts One through Four. J.A. 75-76.[2] On March 7, 1995, the district

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[1] A plea agreement under Rule 11(e)(1)(A) requires the government to "move for dismissal of other charges." An agreement under Rule 11(e)(1)(B) requires the government to "make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court." An agreement under Rule 11(e)(1)(C) requires the government to "agree that a specific sentence is the appropriate disposition of the case."

[2] The district court also ordered that the imprisonment be followed by three years of supervised release, and that respondent pay a $5,000 fine and restitution in the amount of

court entered judgment. J.A. 4, 75-80. Respondent timely appealed. C.A.9 ER at 140.[3]

On April 30, 1996, the Ninth Circuit reversed respondent's conviction, concluding that the district court erred by denying respondent's motion to withdraw his guilty plea.[4] The court ruled that if the district court defers acceptance of the plea or of the plea agreement, the defendant is at liberty to withdraw his plea, "until the time that the court does accept both the plea and the agreement." Pet. App. 4a; 92 F.3d at 781. In so ruling, the court rejected the United States' argument that Rule 32(e) requires a defendant to show a "fair and just reason" for withdrawal from a guilty plea, even before acceptance of the plea agreement. The court explained that the district court's acceptance of the guilty plea did not trigger the requirements of Rule 32(e) because:

> "[t]he plea agreement and the plea are 'inextricably bound up together' such that the deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the plea. This is so even though the court explicitly stated it accepted [the] plea."

Pet. App. 3a; 92 F.3d at 780 (quoting *United States v. Cordova-Perez*, 65 F.3d 1552, 1556 (9th Cir. 1995), *cert. denied*, 117 S. Ct. 113 (Oct. 7, 1996) (No. 95-9101)). Noting the government's concern that the United States Sentencing Commission policy statement in U.S.S.G. § 6B1.1(c) requires the district court to defer acceptance of certain types of plea agreements pending preparation of the presentence report, and citing Rule 11(e)(2), which makes such deferment discretionary, the court of appeals suggested, "if the Sentencing Commission's interference with district court discretion causes practical difficulties regarding pleas, as well it may, that is a situation to which the Commission can turn its attention." Pet. App. 3a-4a; 92 F.3d at 781.

Judge Ferguson concurred, restating his dissent in *Cordova-Perez*:

> I continue to believe [*Cordova-Perez*] was decided incorrectly and that an injustice was done. Yet the government insisted upon the result. Now it would like us to disregard *Cordova-Perez*, which of course would be a monumental disaster. The government cannot have it both ways. When it advocated the result in *Cordova-Perez*, it must live with the mistake.

Pet. App. 5a; 92 F.3d at 781.

On July 29, 1996, the court of appeals unanimously denied the United States' petition for rehearing and rejected the suggestion for rehearing en banc. Pet. App. 6a-7a. On October 15, 1996, the court of appeals issued the mandate, having denied petitioner's third motion for a stay. On October 28, 1996, the petitioner filed the petition for certiorari. On November 19, 1996, the district court held a status conference and continued the case pending resolution of the proceedings in this Court. On

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$477,990.00. J.A. 76-80. Respondent had served the entire 30-month term of imprisonment and was already on supervised release when the court of appeals vacated his conviction.

[3] Respondent's Excerpts of Record filed in the court of appeals are referred to as C.A.9 ER.

[4] The court of appeals did not discuss respondent's other challenges to his conviction and sentence.

January 17, 1997, this Court granted the petition for certiorari.

STATEMENT OF LOWER COURT JURISDICTION UNDER RULE 14.1(i)

The district court had jurisdiction in this matter pursuant to 18 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, invoked by a timely notice of appeal pursuant to Fed. R. App. P. 4(b). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

SUMMARY OF ARGUMENT

The Court of Appeals correctly held that when a criminal defendant tenders a guilty plea pursuant to a plea agreement, the defendant is free to withdraw that plea until the district court accepts *both* the plea and the plea agreement.

When a defendant tenders a guilty plea, the district court may accept or reject the plea agreement, or defer its decision to accept or reject the agreement until it reviews the defendant's presentence report. Fed. R. Crim. P. 11(e)(2).

A review of the Congressional intent behind 1974 amendments to Rule 11 ("Pleas") and Rule 32 ("Sentence and Judgment"), reveals that the district court cannot accept the defendant's tendered guilty plea until it also accepts the plea agreement upon which the agreement depends. In 1974, Rules 11 and 32 were amended to

accommodate judicial review of plea agreements. New Rule 11(e)(2) provided that the court may accept or reject a plea agreement, or defer acceptance of the plea agreement pending review of a presentence report. In order to make possible pre-guilt review of the presentence report, Rule 32(c)(1) (now Rule 32(b)(3)) was amended to allow, with the defendant's written consent, review of a presentence report before the defendant has pleaded guilty. Since Rule 32 already provided for review of the presentence report if the defendant had pleaded guilty, the amendment intended that deferment of acceptance of the agreement carried with it deferment of acceptance of the guilty plea. If a court could accept a guilty plea without accepting the dependent plea agreement, Rule 32(b)(3)'s consent requirement protection would be vitiated. Rule 32(b)(3) limits disclosure of presentence reports because such reports contain prejudicial information, relevant to sentencing but not guilt, which could prejudice the judge before whom the defendant might go to trial. Congress required consent for review of a presentence report before acceptance of the plea agreement because there is still the possibility that the judge will reject the agreement and the defendant will go to trial before the judge who has already reviewed the presentence report. If the judge could accept the guilty plea without accepting the plea agreement, the judge would be able to evade the consent requirement of Rule 32(b)(3). Given the clear Congressional intent to require consent before pre-guilt review of the presentence report, Congress intended that where the court defers acceptance of the plea agreement, acceptance of the plea itself must also be deferred.

As petitioner concedes for purposes of this case (Pet. Br. 16), Rule 32(e), which provides that a defendant can

withdraw a plea of guilty upon showing a "fair and just reason," does not apply prior to the court accepting the guilty plea. First, a defendant is not bound by a guilty plea until the court accepts the plea. Since, a court cannot legally accept the plea without accepting the plea agreement, the guilty plea was not accepted and the defendant was free to withdraw. Second, the "fair and just reason" standard was derived from dictum in the Court's 1927 decision in *Kercheval v. United States*, 274 U.S. 220 (1927). In *Kercheval*, the Court made it clear that a guilty plea is something that requires no more than sentencing and entry of judgment. The same is not true, however, where the court accepts a guilty plea, but defers acceptance of the plea agreement. Where acceptance of the agreement is deferred, the court must accept the agreement before it can sentence the defendant and enter judgment. The "fair and just reason" standard was not intended to apply where the court has deferred acceptance of the plea agreement.

The result sought by petitioner, binding a defendant to a guilty plea before the court approves the agreement upon which the plea depends, violates principles of fair administration of justice. Prior to the court's approval of the agreement, no party is able to reasonably rely upon, nor seek enforcement of, the terms of the agreement. It is manifestly unfair to bind a defendant to an agreement where the other parties – the court and the prosecutor – are not bound and where the defendant cannot seek enforcement. Also, allowing acceptance of the plea before the court accepts the agreement improperly allows the court to evade Rule 32(b)(3)'s consent requirement for pre-guilt review of presentence reports.

Petitioner argues that the court of appeals's holding applies to most cases and that it enables defendants to engage in manipulation by pleading guilty on the eve of trial and then withdrawing after preparation of the presentence report. Petitioner has overstated the scope of the ruling and its susceptibility to manipulation. While plea bargaining is undoubtedly the norm, petitioner has offered no proof that courts defer acceptance of plea agreements in most cases. Many types of agreements, such as promises to recommend a particular sentence (Rule 11(e)(1)(B)), or to not charge the defendant for conduct not covered by the pending indictment do not require acceptance by the court. The only types of agreements that require acceptance are charge-bargain (Rule 11(e)(1)(A)) and sentencing stipulation (Rule 11(e)(1)(C)) agreements. Fed. R. Crim. P. 11(e)(2). Petitioner's fear of manipulation is unfounded because there are tremendous incentives to plead guilty and because defendants, like the prosecution, often want quick resolution of the case. Defendants who withdraw guilty pleas to delay their trials will lose sentence reductions for acceptance of responsibility and could face an enhancement for obstruction of justice. If the prosecutor is concerned that a particular defendant might manipulate the system, the prosecutor can take the precaution of only entering into a Rule 11(e)(1)(B) sentence recommendation agreement with the defendant or by seeking court approval of the agreement at the change of plea hearing or shortly thereafter.

The result reached by the court of appeals was required by the rules, ensures fairness, and does not result in the sort of manipulation petitioner predicts.

ARGUMENT

PRIOR TO ACCEPTANCE OF A RULE 11(e)(1)(A) PLEA AGREEMENT, A CRIMINAL DEFENDANT IS FREE TO WITHDRAW HIS TENDERED GUILTY PLEA.

The court of appeals correctly ruled that deferment of acceptance of the plea agreement necessarily carries with it deferment of acceptance of the guilty plea, and until the district court accepts the plea agreement, the defendant may freely withdraw his guilty plea. 92 F.3d at 780. The government seeks reversal, arguing that the court of appeals' holding (1) is in conflict with the Federal Rules of Criminal Procedure and (2) has "serious adverse practical consequences." To the contrary, the holding (1) is *required* by the federal rules; (2) furthers the fair administration of justice; and (3) is neither as broad in scope nor as susceptible to manipulation as petitioner suggests.

1. Under The Federal Rules Of Criminal Procedure, A Guilty Plea Cannot Be Accepted And Is Not Binding Until Both The Plea *And* The Plea Agreement Are Approved By The Court.

Examination of the 1974 amendments to Rules 11 and 32 reveals that Congress intended that a guilty plea is neither accepted nor binding until the district court has also accepted the plea agreement. Moreover, the precedent upon which Rule 32(e)'s "fair and just reason" standard for withdrawal of a guilty plea is based shows that it was intended to apply to a guilty plea which was not contingent on the subsequent approval of the plea agreement. Finally, support for the interdependence of a guilty plea and a plea agreement is found in related contexts.

a. The Federal Rules of Criminal Procedure Reveal a Congressional Intent That The District Court Cannot Accept a Guilty Plea Until It Accepts the Plea Agreement Upon Which the Plea Depends.

Federal Rules of Criminal Procedure 11 and 32, entitled "Pleas" and "Sentence and Judgment" respectively, govern plea and plea agreement procedures. Prior to 1974, Rule 11 provided that a defendant could plead guilty and that the district court could refuse to accept such a plea. Former Rule 11, as amended Feb. 28, 1966, eff. July 1, 1966.[5] The rule said nothing about the district court's acceptance or rejection of a plea agreement. *Id.* In 1974, this Court transmitted to Congress extensive proposed amendments to the Federal Rules of Criminal Procedure, including new Rule 11(e)(2), which provided that when the defendant offers a guilty plea pursuant to a plea agreement, the district court "may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report."[6] Rule 11(e)(2); Rule 11, Notes of Advisory Committee on Rules, 1974 Amendment; 62 F.R.D. 271, 276 (April 22, 1974). After extensive hearings and comment, Congress enacted a bill adopting, with some changes, the proposed amendments. Congress modified, in part, proposed Rule 11(e)(2), but retained the language noted above, including the option of deferment

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[5] The pertinent parts of the former versions of Rules 11 and 32 discussed in this section are appended to this brief at App. 1-10.

[6] In 1979, Rule 11(e)(2) was clarified in respects not pertinent to this discussion. Rule 11(e)(2), as amended Apr. 30, 1979; Notes of Advisory Committee on Rules, 1979 Amendment.

of acceptance of a plea agreement pending review of the presentence report. Pub.L. 94-64, § 3(5)-(10), 89 Stat. 371, 372; H.R. Rep. No. 247, 94th Cong., 1st Sess., at 2-7 (1975).

Prior to 1974, the rules allowed judicial review of a presentence report only if the defendant "has pleaded guilty or has been found guilty." Former Rule 32(c)(1) (now Rule 32(b)(3)); *Gregg v. United States*, 394 U.S. 489 (1969). In order to make possible the pre-guilt use of the presentence report required for deferred acceptance or rejection of the plea agreement, as contemplated by the adoption of Rule 11(e)(2), an amendment to Rule 32 was also required. The Advisory Committee Notes, which are "of weight" in construing the rule (*Torres v. Oakland Scavanger Co.*, 487 U.S. 312, 316 (1988) (citation omitted)), expressly stated that deferment of acceptance of the plea agreement "is made possible by rule 32 which allows a judge, with the defendant's consent, to inspect a presentence report to determine whether a plea agreement should be accepted." Fed. R. Crim. P. 11, Notes of Advisory Committee on Rules, 1974 Amendment, 62 F.R.D. 271, 285 (1974). Accordingly, an amendment to former Rule 32(c)(1) was proposed, allowing pre-guilt review of the presentence report "with the written consent of the defendant."[7] Former Rule 32(c)(1); Rule 32, Notes of

[7] Rule 32(c)(1) has since been renumbered and amended to permit the defendant and the prosecutor, in addition to the court, to see the presentence report prior to the guilty plea. The rule now reads: "The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty." Fed. R. Crim. P. 32(b)(3); Notes of Advisory Committee on Rules, 1989 Amendments and 1994 Amendments.

Advisory Committee on Rules, 1974 Amendment, 62 F.R.D. at 322. The Advisory Committee explained that the intent of the amendment to Rule 32 was "to permit the judge, after obtaining the defendant's consent, to see the presentence report in order to decide whether to accept a plea agreement." 62 F.R.D. at 322. As it did with Rule 11(e)(2), Congress modified the proposed amendment to former Rule 32(c)(1), but retained the language at issue in this case, providing for pre-guilt review of the presentence report with the defendant's consent. Pub.L. 94-64, § 3(31)-(34), 89 Stat. 371, 376; H.R. Rep. No. 247, 94th Cong., 1st Sess., at 17-18 (1975).

If Congress thought a court could accept a guilty plea without accepting the plea agreement, there would have been no reason to amend Rule 32 to make possible review of the presentence report prior to acceptance of the agreement. The pre-1974 version of Rule 32(c)(1) already allowed review of a presentence report when the defendant had "pleaded guilty." The 1974 amendments thus reveal that the district court cannot accept the guilty plea before it accepts the plea agreement.

The Advisory Committee Notes explain why Congress opted for earlier review of the presentence report instead of acceptance of the plea before acceptance of the plea agreement:

> It has been suggested that the problem [the need to see presentence reports before approving of pleas] be dealt with by allowing the judge to indicate approval of the plea agreement subject to the condition that the information in the presentence report is consistent with what he has been told about the case by counsel. . . .

> *Allowing the judge to see the presentence report prior to his decision as to whether to accept the plea agreement is, in the view of the Advisory Committee, preferable to a conditional acceptance of the plea.* . . . It enables the judge to have all the information available to him at the time he is called upon to decide whether or not to accept the plea of guilty and thus avoids the necessity of a subsequent appearance whenever the information is such that the judge decides to reject the plea agreement.

Fed. R. Crim. P. 32, Notes of Advisory Committee, 1974 Amendments (emphasis added) (citation omitted).

Relying upon Rule 32(c)(1) and the Advisory Committee notes to the 1974 amendments to Rule 11, the First Circuit has recognized that deferment of acceptance of the plea agreement in order to review the presentence report is possible only if the defendant has consented to the judge's review of the presentence report. *United States v. Cruz*, 709 F.2d 111, 114-15 (1st Cir. 1983); *see also United States v. Kurkculer*, 918 F.2d 295, 301 (1st Cir. 1990); *and United States v. Sonderup*, 639 F.2d 294, 295-296 (5th Cir. 1981) (no violation of former Rule 32(c)(1) where district court rejected plea agreement after reading presentence report with defendant's written consent). In *Cruz*, the court explained that allowing a court to revoke its earlier acceptance of a plea agreement on the basis of information in the presentence report "would completely vitiate the protective consent requirements embodied in Rules 11(e) and [former] 32(c)(1)." *Cruz*, 709 F.2d at 115. Allowing acceptance of the guilty plea before acceptance of the plea agreement would have the same effect – providing an end run around Rule 32(b)(3) and vitiating the consent

protection. In contrast, without discussing the advisory committee notes, the Ninth Circuit and the Seventh Circuit have both held that a conditionally accepted guilty plea "satisfies the requirement of Rule 32(b)(3) which provides that the court can review the presentence report after the defendant has pleaded guilty." *Cordova-Perez*, 65 F.3d at 1555-56; *see also United States v. Bunch*, 730 F.2d 517, 519 (7th Cir. 1984). As these cases do not consider the direct evidence of the intent of Rules 11 and 32, they are not persuasive on this point.

Prohibiting acceptance of the guilty plea prior to acceptance of the plea agreement helps fulfill the purposes of the disclosure provisions of Rule 32(b)(3) (former Rule 32(c)(1)). The disclosure provisions protect defendants from prejudice that might result if the judge, who might later preside over the trial, reviews, before a finding of guilt, the presentence report, which has "no formal limitations on [its] contents, and . . . may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged." *Gregg*, 394 U.S. at 492. Given this potential for prejudice, review of the presentence report is allowed only upon a guilty plea, a finding of guilt, or the defendant's written consent. Rule 32(b)(3). The concerns regarding prejudice are so great that the Advisory Committee Notes advise "where the judge rejects the plea agreement after seeing the presentence report, he should be free to recuse himself from later presiding over the trial of the case." Fed. R. Crim. P. 32, Notes of Advisory Committee, 1974 Amendments, 62 F.R.D. at 324. When a court defers acceptance of the plea agreement, there is still the potential that the judge will reject the agreement

and the defendant will proceed to trial before the same judge who reviewed the presentence report. With that possibility still looming, it makes sense to require the defendant's consent before a court uses a presentence report to decide whether to accept a plea agreement. Were acceptance of the guilty plea allowed before acceptance of the plea agreement, the letter and spirit of Rule 32(b)(3)'s consent requirement would be violated.

Petitioner posits that "there is nothing in the Federal Rules of Criminal Procedure that prohibits a district court from accepting a guilty plea before the district court has decided whether to accept a plea agreement." Pet. Br. at 18. While Rules 11(c), (d), and (f), which petitioner cites, state specific inquiries the court must make before accepting a plea, they do not state that the court can accept a guilty plea without accepting the plea agreement. Petitioner's analysis fails to account for the clear intendment found in the 1974 amendments: There can be no acceptance of the guilty plea until there is acceptance of the plea agreement.

Even if the rules allow "acceptance" of the guilty plea prior to acceptance of the agreement, which they do not, it does not mean that such "acceptance" makes the plea binding, or that it requires application of Rule 32(e)'s "fair and just reason" standard. See discussion *infra* at 17-21. At most, "acceptance" of the plea, without acceptance of the agreement, reflects the judge's determination that the plea is entered knowingly and voluntarily, that there is a factual basis for the plea, and that *if* the agreement is also accepted, the plea will become binding. Accordingly, the district court in this case necessarily

deferred its approval of both the plea and the plea agreement, which are inseparable. The actual nature of the underlying acts, not the district court's label, determines what the court did. *See Smalis v. Pennsylvania*, 476 U.S. 140, 144 n.5 (1986).

Because the Congressional intent underlying Rule 11(e)(2) and Rule 32(b)(3) (former Rule 32(c)(1)) is that the court cannot accept a guilty plea without accepting the plea agreement, and because respondent's offer to plead guilty was conditioned on approval of the plea agreement, the deferment of acceptance of the plea agreement carried with it deferment of acceptance of the guilty plea. As the district court in this case did not have authority to accept the guilty plea without accepting the plea agreement, the attempt to do so was not effective and at the time respondent moved to withdraw there was no accepted plea and agreement binding him. Because the deferment of acceptance of respondent's plea agreement carried with it deferment of acceptance of his guilty plea, respondent was free to withdraw his tendered guilty plea at will. The court of appeals' decision should be affirmed.

b. Rule 32(e)'s "Fair and Just Reason" Standard Does Not Apply Where The Court Has Deferred Acceptance of the Plea Agreement.

Rule 32(e) of the Federal Rules of Criminal Procedure provides that prior to imposition of sentence, a defendant may withdraw from a "plea of guilty" upon a showing of "any fair and just reason." Fed. R. Crim. P. 32(e). For two related, but independent reasons, a defendant need not

show a "fair and just reason" under Rule 32(e) to withdraw a tendered, but not accepted, guilty plea.

First, as explained in the previous section, the court cannot accept a guilty plea before it accepts the plea agreement. As conceded for purposes of this case by petitioner, "[u]ntil the district court accepts a guilty plea, the defendant is free to withdraw it." Pet. Br. at 16 (citing *United States v. Washman*, 66 F.3d 210, 212-213 (9th Cir. 1995)); *see also United States v. Wessels*, 12 F.3d 746, 753 (8th Cir. 1993); *United States v. Papaleo*, 853 F.2d 16, 19 (1st Cir. 1988); *United States v. Ocanas*, 628 F.2d 353, 358 (5th Cir. 1980). Likewise, until a defendant pleads guilty, the prosecutor may withdraw from a plea agreement. *Mabry v. Johnson*, 467 U.S. 504, 507-11 (1984); *Wessels*, 12 F.3d at 753. Because the district court had not effectively accepted the plea at the time respondent moved to withdraw his plea and because a plea is not binding until the court accepts it, respondent did not need to show a "fair and just reason" for withdrawing his offered plea. The cases petitioner cites (Pet. Br. 15) to support application of Rule 32(e) after acceptance of the plea but before acceptance of the plea agreement fail to consider the legislative history, discussed in section 1(a), *supra*, showing the intent that the district court cannot accept a guilty plea until it accepts a plea agreement. *United States v. Ewing*, 957 F.2d 115, 119 (4th Cir.), *cert. denied*, 505 U.S. 1210 (1992); *United States v. Ellison*, 798 F.2d 1102 (9th Cir. 1986), *cert. denied*, 479 U.S. 1038 (1987).

Second, the evolution of Rule 32(e) shows that it applies to fully accepted guilty pleas, not merely tendered pleas and not merely conditionally accepted pleas. In 1983, former Rule 32(d) (now Rule 32(e)) was amended

to "incorporate[ ] the 'fair and just' standard which the federal courts, relying upon dictum in *Kercheval v. United States*, 274 U.S. 220 (1927), have applied to presentence motions [to withdraw]."[8] Fed. R. Crim. P. 32, Notes of Advisory Committee on Rules, 1983 Amendment. In 1927, when the Court stated in *Kercheval* its approval of the "fair and just reason" standard, it did not have in mind merely a tendered plea nor a "conditionally" accepted plea. In fact, the *Kercheval* Court described how it viewed a guilty plea: "Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence." *Kercheval*, 274 U.S. at 223. More recent decisions of the court confirm that a "plea of guilty" is more than a mere admission of conduct. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) ("a plea of guilty is more than an admission of conduct; it is a conviction") (footnote omitted); *Brady v. United States*, 397 U.S. 742, 748 (1970) ("the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial – a waiver of his right to trial before a jury or a judge").

In fact, when the Court decided *Kercheval* in 1927 and when former Rule 32(d) was first adopted in 1944, there was no provision for judicial review of plea agreements, let alone deferment of acceptance of the plea agreement pending review of the presentence report. Prior to the 1974 amendments, "plea discussions and agreements . . . occurred in an informal and largely invisible manner."

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[8] In *Kercheval*, the Court held that a withdrawn guilty plea is inadmissible in a subsequent trial on the same charges. 274 U.S. 220.

Fed. R. Crim. P. 11, Notes of Advisory Committee, 1974 Amendment, 62 F.R.D. at 282. The objective of the 1974 amendment was "to bring the existence of the plea agreement out into the open in court; and to provide methods for court acceptance or rejection of a plea agreement." *Id.* at 277. Implicitly, there was little review of plea agreements prior to 1974.

Deferment of acceptance of the plea agreement did not become essential and mandatory until the 1987 adoption of the Sentencing Reform Act, which brought determinate sentencing and the federal Sentencing Guidelines. Contrary to the permissive language of Rule 11(e)(2), the guidelines expressly provided that in the case of Rule 11(e)(1)(A) (charge-bargain) and Rule 11(e)(1)(C) (sentence stipulation) plea agreements, the judge "shall" defer acceptance of the plea agreement in order to review the presentence report. U.S.S.G. § 6B1.1(c), p.s. Prior to the guidelines, there was little need for the judge to defer acceptance of the plea agreement: "a judge often could accept [a charge-bargain] agreement without notably limiting his or her sentencing power. With the guidelines, the dismissal of charges has a more direct and substantial effect on sentencing." Albert W. Alshuler & Stephen J. Schulhofer, *Judicial Impressions of the Sentencing Guidelines*, Federal Sentencing Reporter, September 1989 at 94. With the advent of the guidelines, deferment became essential, requiring the judge to determine whether the sentence resulting from the bargain adequately reflected the seriousness of the conduct.

Since a guilty plea is a conviction, not needing anything more than entry of judgment, and since deferral of acceptance of the agreement became necessary relatively

recently in the long life of the "fair and just" standard, the standard cannot be said to have been intended to apply to a tendered guilty plea which was conditioned on later acceptance of the plea agreement. Unlike the plea in *Kercheval*, when there is deferment of acceptance of the plea agreement, "more" is required before sentencing and judgment. The court must first accept the plea agreement. Until the court does so, the court cannot sentence the defendant or enter a judgment of conviction on the record, and the defendant is not bound by the plea. *Kercheval* presupposes a guilty plea which is not conditioned on later acceptance of a plea agreement. Accordingly, Rule 32(e)'s "fair and just reason" standard does not apply to a motion to withdraw a guilty plea filed prior to acceptance of the plea agreement.

Rule 11(e)(4) also suggests that Rule 32(e) does not apply to a guilty plea where the plea agreement has not been accepted. Rule 11(e)(4) provides, in pertinent part, "[i]f the court rejects the plea agreement, the court shall . . . afford the defendant the opportunity to then withdraw the plea." Under this provision, if the court rejects the plea agreement, Rule 32(e)'s "fair and just reason" standard does not apply. It is implicit in Rule 11(e)(4) that Rule 32(e) does not apply because the defendant is *absolutely* not bound by a guilty plea if the plea agreement has not been accepted. Rule 11(e)(4) recognizes that the guilty plea and the plea agreement are "inextricably bound up together." The principle applies where the district court has rejected the plea agreement or, as in this case, where the district court has not yet accepted or rejected the agreement.

Petitioner claims that Rule 11(e)(4) "states the only circumstance in which the defendant may unilaterally withdraw a plea." Pet. Br. 14. But Rule 11(e)(4) is not a rule setting out all the circumstances under which a defendant can withdraw a tendered guilty plea. Rule 11(e)(4), which is entitled "Rejection of a Plea Agreement," simply sets out what the district court must do upon rejecting a plea agreement: inform the parties of the rejection of the agreement; advise the defendant that the court is not bound by the agreement; afford the defendant the opportunity to withdraw; and advise the defendant that if he or she persists in the guilty plea, the disposition may be less favorable than contemplated by the agreement. It would not make sense to place under the heading "Rejection of a Plea Agreement" a provision for withdrawing from a guilty plea when the district court has not yet rejected the agreement. Since Rule 11(e)(4) does not set out all of the circumstances under which a defendant can withdraw from a plea agreement, the court of appeals decision allowing withdrawal before rejection of the agreement is not in conflict with that rule. To the contrary, Rule 11(e)(4), in its recognition of the inseparability of pleas and plea agreements, supports the court of appeals' decision.

Accordingly, Rule 32(e)'s "fair and just reason" standard does not apply unless the court has accepted the guilty plea, which cannot be accepted before the court accepts the plea agreement.

c. Guilty Pleas Tendered Pursuant to a Plea Agreement Are Inherently Conditional, Not Having Effect Until The District Court Accepts The Agreement.

In related contexts, courts have noted the guilty plea's dependence on acceptance of the plea agreement. For instance, the courts have held that acceptance of the guilty plea does not bind the district court to the agreement. *Cordova-Perez*, 65 F.3d at 1554-56; *United States v. Livingston*, 941 F.2d 431, 436 (6th Cir. 1991).

Both the Fifth and the Ninth Circuits have noted the fact that guilty pleas are inherently conditional when they are accompanied by an unaccepted plea agreement. For example, in *Cordova-Perez*, the Ninth Circuit held that even after accepting a guilty plea the district court can reject the plea agreement, vacate the previously accepted guilty plea, and order that the defendant be tried. *Cordova-Perez*, 65 F.3d at 1556. In *Cordova-Perez*, the district court, as in this case, expressly accepted the guilty plea but deferred acceptance of the plea agreement. *Cordova-Perez*, 65 F.3d at 1554. After reviewing the presentence report, however, the district court rejected the plea agreement. Over the defendant's objection, the court vacated the defendant's guilty plea to a lesser offense, and reinstated the original indictment. *Id.* On appeal, the defendant argued that the rejection of the previously accepted guilty plea violated the Federal Rules of Criminal Procedure and the Double Jeopardy Clause. *Id.* at 1554-57. As urged by the government, the Ninth Circuit rejected these arguments on the ground that "deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the

plea." *Cordova-Perez*, 65 F.3d at 1556.[9] The *Cordova-Perez* court went on to hold that the possibility that the court might vacate the guilty plea is inherent when acceptance of the guilty plea is conditional. The court also held that jeopardy does not attach when acceptance of the guilty plea is conditional.[10] *Cordova-Perez*, 65 F.3d at 1556-57.

Similarly, the Fifth Circuit has held that relief is not available to a criminal defendant where the government breached the terms of an agreement prior to its approval

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[9] When the defendant in *Cordova-Perez* sought review by this Court, petitioner opposed a grant of certiorari, and agreed with the court of appeals' holding that "acceptance of the guilty plea is inherently conditional upon the later acceptance of the plea agreement." Brief for the United States in Opposition, at 6 n.4, *Cordova-Perez* (No. 95-9101). When that rule was applied against the government in this case, it then argued that the rule was incorrect. Reply Br. On Pet. for Cert. at 8. Petitioner's change of position came quickly, having filed its petition for certiorari in this case just three weeks after the Court denied the petition for certiorari in *Cordova-Perez*. *Compare* Pet. (filed October 28, 1996) *with Cordova-Perez, cert. denied*, 117 S. Ct. 113 (Oct. 7, 1996) (No. 95-9101).

[10] Under petitioner's rule, jeopardy may attach when the trial court accepts a plea to a lesser included offense but defers acceptance of the plea agreement. Although this Court has held that jeopardy does not attach when a defendant pleads to a lesser included offense if the prosecutor objects "to disposing of any of the counts against [the defendant] without a trial," *Ohio v. Johnson*, 467 U.S. 493, 501 (1984), it is still an open question whether jeopardy would attach to a plea that the prosecutor negotiated. Of course, under the correct rule announced by the court of appeals in this case, these jeopardy problems are avoided because when the plea is not accepted until the plea agreement is also accepted there is no conviction and no jeopardy.

by the court. *United States v. Ocanas*, 628 F.2d 353, 358 (5th Cir. 1980). The *Ocanas* court aptly explained that until the court accepts the plea agreement, the parties cannot rely on the bargain and are free to withdraw:

> [T]he realization of whatever expectations the prosecutor and defendant have as a result of their bargain depends entirely on the approval of the trial court. Surely neither party contemplates any benefit from the agreement unless and until the trial judge approves the bargain and accepts the guilty plea. Neither party is justified in relying substantially on the bargain until the trial court approves it. We are therefore reluctant to bind them to the agreement until that time. As a general rule, then, *we think that either party should be entitled to modify its position and even withdraw its consent to the bargain until the plea is tendered and the bargain as it then exists is accepted by the court.*

Id. at 358 (emphasis added).

The interdependence of pleas and plea agreements is also implicit in the courts' interchangeable use of the terms "plea" and "plea agreement" when discussing acceptance and deferment. *See e.g. United States v. Blackwell*, 694 F.2d 1325, 1339 (D.C. Cir. 1982) ("the rule does permit deferral of the decision to accept or reject the *plea*, usually for the purpose of viewing the presentence report") (emphasis added); and *United States v. Kurkculer*, 918 F.2d 295, 301 (1st Cir. 1990) ("Fed.R.Crim.P. 11(e) allows the court to accept or reject a *guilty plea*, or to defer its decision until it has had the opportunity to review the presentence report.") (emphasis added).

2. An Absolute Right to Withdraw Prior to Acceptance of the Plea Agreement Is Essential to the Fair Administration of Justice.

Several policy concerns support the court of appeals' holding that a guilty plea cannot be accepted and is not binding until the court also accepts the plea agreement. First, if a guilty plea can be accepted prior to acceptance of the plea agreement, the courts will be able to evade Rule 32(b)(3)'s consent requirement for pre-guilt review of the presentence report. Prior to acceptance of the agreement, trial is still a possibility as the court may reject the agreement. Given the serious potential for prejudice resulting from review of the presentence report, the consent requirement must be preserved. The consent provision can be preserved only by prohibiting district courts from "conditionally" accepting a plea to evade Rule 32(b)(3)'s consent requirement.

Second, it is manifestly unfair to bind a defendant to an agreement before the prosecutor and the court are likewise bound and before the defendant can rely on the agreement. The caselaw is clear that before the court accepts the agreement the defendant cannot reasonably rely upon it. *See e.g. Livingston*, 941 F.2d at 436 (6th Cir. 1991); *Wessels*, 12 F.3d at 753 (defendant "was not justified in relying on the terms of the plea agreement because it had not been approved and accepted by the district court") (footnote omitted). Petitioner seeks the anomalous result that a defendant be bound by an agreement during a period of time when he or she cannot rely upon the agreement. As the *Blackwell* court explained, "Pleas that bind only the defendant, or even the prosecutor and the defendant, but not the judge, would be unfair to the

defendant and would dilute the incentive for defendants to plea at all." *Blackwell*, 694 F.2d at 1339.

Implicit in a defendant's tendered guilty plea and concomitant waiver of his constitutional right to a trial, is that the plea and the waiver are offered on the condition that the court will accept both the plea and the plea agreement. Where the plea is made pursuant to a plea agreement, the defendant offers for acceptance a package consisting of both his plea and the agreement – the defendant does not offer one without the other. The court should not be free to accept the guilty plea and the waiver of the right to trial, until it accepts the dependent plea agreement.

Finally, in light of the complexity and determinate nature of the Sentencing Guidelines, allowing defendants to review the presentence report before they are bound by the agreement serves the important function of having defendants understand the implications of the agreements they enter. While still a circuit judge, Justice Breyer recognized that the sentencing consequences of a plea are not known until the court accepts the plea agreement: "the [Sentencing] Commission has suggested that a court can, in its discretion, defer consideration of the plea agreement until it has read the probation officer's report. . . . Such a deferral may be necessary in order for the court to inform the defendant of the sentencing consequences of the plea, as required by Rule 11(c)(1)."[11]

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[11] Rule 11(c)(1) requires the court to advise the defendant of, among other things, the mandatory minimum sentence and the maximum sentence under the agreement.

Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 30 n.144 (1988) (citations omitted). Implicit in this statement is the recognition that it is approval of the plea agreement, particularly in the case of type A charge-dismissal agreements, which determines the real minimum and maximum sentence a defendant faces. As one court has noted, "while Rule 11 requires a court to advise the defendant of the 'maximum possible penalty provided by law' . . . in many federal criminal cases today, this statutory maximum is irrelevant. The reality is that the sentencing court is confined to the range of penalties prescribed by the Guidelines except in the rare instances in which an upward departure is permitted." *United States v. Horne*, 987 F.2d 833, 838 (D.C. Cir. 1993) (Buckley, J. writing separately for the court.) Such a discrepancy was present in this case. At the Rule 11 hearing the court advised respondent that his statutory maximum sentence under the plea agreement was 30 *years*; from the presentence report, respondent learned that absent a departure the maximum legal sentence under the guidelines, as applied pursuant to 18 U.S.C. § 3553(b), was 30 *months*. Compare J.A. 52 with J.A. 80. While Rule 11 and the constitution may not require advice as to the ultimate sentencing range under the guidelines, allowing a defendant to review his presentence report prior to being bound by a guilty plea would make defendants' decisions to plead guilty more informed. Whether the court of appeals' holding results in pre-plea preparation of the presentence report or allows withdrawal after review of the presentence report, the worthwhile end of more informed decisions is served.

3. The Court of Appeals' Holding Neither Applies to All Plea Agreements Nor Introduces Instability Into the Plea Bargaining Process.

Petitioner has sounded the alarm, complaining that the holding of the court of appeals will "introduce substantial instability into the plea bargaining process" and "encourages defendants to engage in manipulation and gamesmanship." Pet. Br. at 9, 21. As an example, petitioner suggests that a defendant could delay a trial several months by entering a plea just before trial and by withdrawing the plea just before sentencing. *Id.* at 21. There is, however, no cause for panic. Petitioner has overstated both the scope of the holding below and the potential for abuse.

a. The Court of Appeals' Ruling Does Not Apply to "Most" Plea Agreements.

Petitioner vastly overstates of the court of appeals' holding claiming, "the net effect of the Ninth Circuit's rule would be to displace Rule 32(e)'s 'fair and just reason' standard in *most* cases from the time of entry of the guilty plea until the presentence report is prepared, at or near sentencing." Pet. Br. at 22-23 (emphasis added). The rule does not apply to "most cases" and does not require deferment of acceptance of the agreement until sentencing.

Petitioner correctly states that the rule would "apply to any case in which (a) the court has accepted a guilty plea at the Rule 11 plea proceeding, and (b) the court has deferred accepting an accompanying plea agreement." Pet. Br. 21. But, as petitioner acknowledges elsewhere

(Pet. Br. 13 n.3), deferment of acceptance of the plea agreement is only possible in 11(e)(1)(A) (charge dismissal) and 11(e)(1)(C) (sentence stipulation) agreements, *not* in 11(e)(1)(B) (sentence recommendation) agreements. Fed. R. Crim. P. 11(e)(2). At least one court has held that the Ninth Circuit's decision in this case applies only to Rule 11(e)(1)(A) and 11(e)(1)(C) agreements, and not to Rule 11(e)(1)(B) agreements. *United States v. Lopez-Reyes*, 933 F.Supp. 957, 959-60 (S.D. Cal. 1996). The government, while acknowledging that 11(e)(1)(B) agreements do not require acceptance (and therefore deferment), cites no statistics on the frequency of the different types of agreements. Pet. Br. 12-13, 22, 13 n.3. Without such statistics, the petitioner's bald assertion that "courts ordinarily defer decision on whether to accept the plea agreement," is mere speculation. Pet. Br. at 22.

Type C (sentence stipulation) agreements are in any event "very rare." *See* Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines*, 27 Am. Crim. L. Rev. 231, 239 (1989). Although charge-bargain agreements appear to be the most common, there is no evidence that they constitute "most" of all bargains. *Id.* The majority of bargains could consist of type B (sentence recommendation) agreements combined with agreements which do not fall under any of the three specified types, such as cooperation agreements, fact-stipulation agreements, agreements not to charge a third party, agreements to not seek forfeiture of property, or agreements not to charge unrelated, uncharged conduct.

Petitioner has thus offered no evidence that deferment of acceptance of the plea agreement is either possible or likely in "most" cases. Even if the guidelines

directive to defer acceptance of the plea agreement (U.S.S.G. § 6B1.1, p.s.) has resulted in more frequent deferment of acceptance of plea agreements and thus diminished the applicability of Rule 32(e), this does not change the intent of Rules 11 and 32 (see discussion in section 1, *supra*). The proper remedy is not judicial reinterpretation of the rules to fit changed practices, but amendment of any stale rules or guidelines through the rules and guidelines amendment procedures. In fact, with respect to plea bargain practice, the Sentencing Commission has expressly stated that it intends to monitor plea bargain practices and further regulate plea agreement process as needed. U.S.S.G. Ch. 1 Pt. A(4)(c).

Moreover, as discussed in detail below, in the cases where deferment is possible the district court is not required to defer. The district court can accept the agreement at the Rule 11 hearing without waiting for the presentence report, or the district court can have the presentence report prepared early, prior to the plea. See note 14, *infra*. In either case, Rule 32(e)'s "fair and just reason" standard would apply long before the sentencing hearing, and would not evaporate in most cases.

b. There Are Effective Mechanisms To Curtail Any "Manipulation" Resulting From The Rule.

Petitioner need not fret about manipulation or gamesmanship as it has effective tools to eliminate any incentives to withdraw from the types of agreements (A and C) where deferment is allowed.

First, there is inherently little to no incentive for a defendant to withdraw from a type C agreement. Such an

agreement includes a stipulation to a specific sentence, and leaves no uncertainty as to the defendant's sentence. The content of the presentence report, while influencing the court's decision as to whether to accept the agreement, can have no influence on the actual sentence should the court accept the agreement. Type C defendants have no reason to manipulate the government by withdrawing after reviewing their presentence reports.

Second, petitioner also need not worry about defendants withdrawing from type A agreements. If the government is entering into meaningful type A bargains, defendants will have little incentive to withdraw from the plea agreements. Because uncharged conduct and dismissed charges can be relied upon in sentencing, as they were in this case (U.S.S.G. § 1B1.3)[12], many type A agreements to dismiss charges are relatively empty promises which offer very little to defendants. This is so unless the defendant pleads guilty to a lesser offense with no minimum sentence in lieu of a greater offense which has a mandatory minimum sentence, or where the lesser offense has a very low maximum sentence. Thus, if the government is concerned that a particular defendant is unreliable and will withdraw from type A agreements after viewing the presentence report, the government can refrain from entering the type A agreements which do not significantly limit the defendant's sentence. As such

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[12] Cf. *Watts v. United States*, ___ U.S. ___, 117 S. Ct. 633 (1997) ("a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.")

agreements offer little to defendants, such a policy should not impede the government's ability to reach agreements with defendants. Although there may be other incentives to plea bargaining, such as avoiding any additional stigma of multiple counts of conviction, a primary motivation for pleading guilty is the chance for a reduced sentence. See Gene M. Grossman & Michael L. Katz, *Plea Bargaining and Social Welfare*, 73 Am. Econ. Rev. 749, 750 (1983).

Where type A agreements are not illusory, they guarantee such significant sentence protection that few defendants would seek to withdraw from those agreements. Those cases involve a guilty plea to a lesser offense which has a substantially lower maximum sentence compared to the dismissed charge, which might have a minimum mandatory sentence.[13] Such a bargain has tremendous benefit for the defendant, possibly limiting the *maximum* sentence on the count of conviction to be lower than the *minimum* sentence for the dismissed charge.

Third, there are in all cases, type A or type C, substantial disincentives to the manipulations petitioner predicts. Perhaps most profound and pervasive, by

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[13] A bargain of this type has been found in drug cases where the defendant has been charged with a drug offense involving a minimum mandatory sentence of five or ten years. 21 U.S.C. § 841(b). In exchange for the dismissal of the drug charge, the defendant pleads guilty to a charge, for example, of use of a communication facility in connection with a drug offense. 21 U.S.C. § 843. The telephone charge has a *maximum* penalty of four years and no mandatory minimum. *Id.*

withdrawing a guilty plea a defendant may lose a sentence reduction for acceptance of responsibility. A defendant who timely accepts responsibility can receive a two- or three-level reduction in his or her total offense level. U.S.S.G. § 3E1.1. In fact, the relative stability of plea bargaining rates before and after the implementation of the Guidelines has been tied to "the remaining tangible reasons for a defendant to plea bargain, among them the acceptance of responsibility reduction and the potential for a prosecutor's recommendation of the low end of the sentence range." Tung Yin, Comment, *Not A Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement in Sentencing Under the Federal Guidelines*, 83 Cal. L. Rev. 419, 460 (1995). Moreover, if the guilty plea were used as a ruse to delay the proceedings in the hope that witnesses and evidence would be lost, the defendant might suffer a two-level enhancement, or even a separate conviction for a willful endeavor to obstruct "the due administration of justice." U.S.S.G. § 3C1.1; 18 U.S.C. § 1503(a). In short, the incentives to plead guilty are great – so much so that the rate of federal criminal convictions obtained by guilty plea has steadfastly exceeded 90% for many years. *Santobello v. New York*, 404 U.S. 257, 264 n.2 (1971) (Douglas, J. concurring) (90.2% in 1964); Annual Report of the Director, Administrative Office of the United States Courts, Judicial Business of the United States Courts, Table D-4, p. 221 (1996) (91.7% for 12-month period ending Sept. 30, 1996)). The driving forces behind these statistics do not disappear, nor are they diminished, if the Court affirms the court of appeals in this case.

Fourth, if the government is wary that a particular defendant is apt to manipulate the system, the government can ask the district court to accept the plea agreement at the Rule 11 hearing with or without a presentence report. The purpose of deferment of acceptance pending review of the presentence report is to enable the court to determine whether the remaining charges reflect the seriousness of the offense and that the agreement does not undermine the intent of the criminal code or the Sentencing Guidelines. U.S.S.G. § 6B1.2(a), p.s. In many cases, where the severity of the offense, *e.g.*, magnitude of financial loss caused or quantity of drugs, is apparent without a presentence investigation, the court can pass on the appropriateness of the bargain without waiting for the presentence report.[14] See William Stafford (then-Chief Judge, N.D. Fla.), *Settling Sentencing Facts at*

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[14] To some extent there is a conflict between Rule 11(e)(2), which makes deferment of acceptance of a type A and C plea agreements permissive, and U.S.S.G. § 6B1.1(c) which makes such deferment mandatory. According to the Sentencing Commission itself, Rule 11(e)(2) controls over the guidelines in the case of a conflict like this: "The Commission decided not to make major changes in plea agreement practices in the initial guidelines, but rather to provide guidance by issuing general policy statements concerning the acceptance of plea agreements. . . . The rules set forth in Fed. R. Crim. P. 11(e) govern the acceptance and rejection of such agreements." U.S.S.G. Ch. 1, Pt. A(4)(c). Also, the extent to which a Sentencing Commission policy statement which does *not* interpret a guideline may be binding is not definitively resolved. *Cf. Stinson v. United States*, 508 U.S. 36 (1993); *Williams v. United States*, 503 U.S. 193, 200-201 (1992). The Sentencing Reform Act authorized the Sentencing Commission to promulgate policy statements, but *not* guidelines, with respect to plea bargain practice. 28 U.S.C. §§ 994(a)(1) and (2)(E).

the Guilty Plea Hearing: A Time-Saver For the Court, Federal Sentencing Reporter, January/February, 1991 at 214 ("most of the factors we must take into account at sentencing can be established at [the] time of the Rule 11 plea procedure").

If earlier acceptance of the agreement raises concerns that acceptance might come before review of the presentence report, another solution would be earlier preparation of presentence reports. The rules permit preparation and review of the presentence report prior to acceptance of the guilty plea and plea agreement. Fed. R. Crim. P. 32(b)(1), (3), and (6); *United States v. Kurkculer*, 918 F.2d 295, 301 (1st Cir. 1990) (Rule 32 was modified to permit the district court, with the defendant's permission, to see the presentence report prior to accepting a guilty plea).

Pre-plea preparation of presentence reports would not only permit earlier acceptance of plea agreements, but would better ensure that the defendant enters the guilty plea with more complete information. *See United States v. Puckett*, 61 F.3d 1092, 1099 (4th Cir. 1995) (court "sympathetic" to defense counsel's concerns that presentence report should be prepared during plea negotiations and prior to acceptance of the guilty plea); *United States v. Horne*, 987 F.2d 833, 839 (D.C. Cir. 1993) (Buckley, J., writing separately for the court) ("Because the Guidelines have largely replaced the statutes as the determinants of the maximum penalty facing criminal defendants, we recommend that, wherever feasible, the district court make their presentence reports available to defendants before taking their pleas."); *see also* Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 Columbia L. Rev. 1059, 1117-18 (1976) (presentence report of

limited content should be made available prior to plea bargaining). Such procedures would also ensure, up front, that guilty pleas more accurately reflect the seriousness of the offense.

Even without a pre-plea presentence report, prosecuting attorneys can avoid late withdrawals of guilty pleas by complying with a suggestion of the Sentencing Commission: "prior to the entry of a plea of guilty . . . to disclose to the defendant the facts and circumstances of the offense and offender characteristics, then known to the prosecuting attorney, that are relevant to the application of the sentencing guidelines." U.S.S.G. § 6B1.2, comment. Such early disclosure would eliminate most surprises in the presentence report and thus significantly reduce the impetus for a defendant to withdraw a guilty plea late in the proceeding.

Petitioner claims that withdrawal of the guilty plea after preparation of the presentence report will result in "needless preparation and review of a presentence report." Pet. Br. at 21. Somehow, petitioner forgets that when a defendant goes to trial, a presentence report will still be necessary in most cases. In the 12-month period ending September 30, 1996, approximately 82% of defendants who went to trial were convicted (84% if drunk driving and traffic offense trials are not counted). Annual Report of the Director, Administrative Office of the United States Courts, Judicial Business of the United States Courts, Table D-4, pp. 221-223 (1996). Odds are very strong that the defendant who withdraws from a plea agreement and goes to trial will be convicted, and the earlier-prepared presentence report will be needed.

Finally, the government assumes that delay of the trial is to the defendant's advantage. To the contrary, defendants are also often harmed by delay. If the defendant has private counsel, having to pay twice for trial preparation may be quite costly. If the defendant is in pre-trial detention, trial delays will result either in delaying his or her release following acquittal or delaying his or her transfer from jail to prison. Finally, delays in the trial could impede the defense, resulting in the loss of defense witnesses or evidence.

While the court of appeals' rule may make delay and manipulation theoretically possible, it does not make it likely. There are other pre-trial procedures, such as discovery, change of counsel, or pre-trial motions, which can also be used for delay. While some defendants, and prosecutors for that matter, might manipulate such procedures for purposes of delay, the mere possibility that a few might do so is not so great that the procedures are eliminated.

Petitioner's predictions of calamity are unsupported by available statistics. If petitioner is correct that the court of appeals' holding will result in defendants withdrawing from guilty pleas upon review of the presentence report, then there should be a reduction in the rate of conviction by guilty plea. Although the court of appeals published its decision less than a year ago, on April 30, 1996, statistics are available on guilty plea rates for a portion of that period. If things were as dire as petitioner suggests, there should already be some measurable drop in the rate of conviction by guilty plea in the Ninth Circuit. But there has been no such change. In fact, the Ninth Circuit's rate of conviction by guilty plea was

slightly higher for the 12-month period ending September 30, 1996, (95.7%), when compared to the rates for the 12-month periods ending September 30, 1995, (95.6%) and September 30, 1994, (93.9%). Annual Report of the Director, Administrative Office of the United States Courts, Judicial Business of the United States Courts, Table D-7, p. 233 (1996); Annual Report of the Director, Administrative Office of the United States Courts, Judicial Business of the United States Courts, Table D-7, p. 237 (1995); Annual Report of the Director, Administrative Office of the United States Courts, Judicial Business of the United States Courts, Table D-7, p. A-86 (1994).

Likewise, the rates of conviction by guilty plea in the Fourth Circuit (89.5%) and the Seventh Circuit (89.9%), which have expressly disapproved of the court of appeals' rule in this case, are lower than the Ninth Circuit rate (95.7%) for the period ending September 30, 1996. Administrative Office of the United States Courts, Judicial Business of the United States Courts, Table D-7, pp. 232-33 (1996).

Moreover, petitioner has shown no evidence that defendants are relying on this rule to delay their trials by pleading guilty on the first day set for trial, and then, months later, withdrawing the plea and going to trial. If petitioner's fears are justified, there should be evidence of such tactics. Petitioner offers none.

As there are built-in disincentives for the sort of manipulation petitioner forewarns, as the only available statistics show that there has been no reduction in the rate of conviction by guilty plea in the Ninth Circuit, and as the government has offered no evidence that there has

been such an effect, the world of plea bargaining will not collapse should the Court affirm the court of appeals. The Court has previously refused to be swayed by similar unfounded cries of calamity. *United States v. Mezzanatto*, 115 S.Ct. 797, 804-05 and n.6 (1995) (rejecting argument that allowing waiver of Rule 11(e)(6)'s prohibition on the admissibility of plea-statements would have a chilling effect on plea bargaining where "Respondent ha[d] failed to offer any empirical support for his apocalyptic predictions"). As in *Mezzanatto*, the only available statistical data indicates that the court of appeals' ruling has had no impact on the guilty plea rate in the Ninth Circuit.

CONCLUSION

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit should be affirmed.[15]

Respectfully submitted,

JONATHAN D. SOGLIN
Attorney for Respondent

Dated: March 28, 1997

[15] Should the Court disagree and reverse the judgment of the court of appeals, respondent requests a remand to the court of appeals to enable that court to consider and decide the additional issues respondent raised in that court, which the court of appeal did not reach in light of its reversal of respondent's conviction on the ground before this Court.

APPENDIX

FEDERAL RULES OF CRIMINAL PROCEDURE

1. Rule 11 of the Federal Rules of Criminal Procedure, as amended Feb. 28, 1966, eff. July 1, 1966, provided:

Rule 11. Pleas

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such a plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

2. Rule 11 of the Federal Rules of Criminal Procedure, as amended Apr. 22, 1974, eff. Dec. 1, 1975, eff. Aug. 1 and Dec.1, 1975; July 31, 1975, Pub.L. 94-64, § 3(5)-(10), 89 Stat. 371, 372, provided:

Rule 11. Pleas

(a) **Alternatives.** A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) ***Nolo Contendere.*** A defendant may plead nolo contendere only with the consent of the court. Such a plea

shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) **Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) **Insuring that the plea is voluntary.** The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) **Plea agreement procedure.**

(1) **In General.** The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding the such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) **Notice of Such Agreement.** If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing

of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Offers of Pleas, and Related Statements. Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or

offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of the plea.

3. Rule 11, Federal Rules of Criminal Procedure, Notes of Advisory Committee on Rules, 1974 Amendment provided, in part,:

* * *

Upon notice of the plea agreement, the court is given the option to accept or reject the agreement or defer its decision until receipt of the presentence report.

The judge may, and often should defer his decision until he examines the presentence report. This is made possible by rule 32 which allows a judge, with the defendant's consent, to inspect a presentence report to determine whether a plea agreement should be accepted.

* * *

4. Former Rule 32(c)(1) of the Federal Rules of Criminal Procedure, as originally enacted, provided:

Rule 32. Sentence and Judgment

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

5. Former Rule 32(c)(1) of the Federal Rules of Criminal Procedure 32(c)(1), as amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(31)-(34), 89 Stat. 376, provides:

Rule 32. Sentence and Judgment

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information

sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

6. Rule 32, Federal Rules of Criminal Procedure, Notes of Advisory Committee on Rules, 1974 Amendment provided, in part,:

* * *

Subdivision (c)(1) makes clear that a presentence report is required except when the court otherwise directs for reasons stated of record. The requirement of reasons on the record for not having a presentence report is intended to make clear that such a report ought to be routinely required except in cases where there is a reason for not doing so. The presentence report is of great value for correctional purposes and will serve as a valuable aid in reviewing sentences to the extent that sentence review may be authorized by further rule change. For an analysis of the current rules as it relates to the situation in which a presentence investigation is required, see C. Wright, Federal Practice and Procedure: Criminal § 522 (1969); 8A J. Moore, Federal Practice ¶ 32.03[1] (2d ed. Cipes 1969).

Subdivision (c)(1) is also changed to permit the judge, after obtaining defendant's consent, to see the presentence report in order to decide whether to accept a

plea agreement, and also to expedite the imposition of sentence in a case in which the defendant has indicated that he may plead guilty or nolo contendere.

Former subdivision (c)(1) provides that "The report shall not be submitted to the court * * * unless the defendant has pleaded guilty * * * ." This precludes a judge from seeing a presentence report prior to the acceptance of the plea of guilty. L. Orfield, Criminal Procedure Under the Federal Rules § 32:35 (1967); 8A J. Moore, Federal Practice ¶ 32.03[2], p. 32-22 (2d ed. Cipes 1969); C. Wright, Federal Practice and Procedure: Criminal § 523, p. 392 (1969); *Gregg v. United States*, 394 U.S. 489, 89 S.Ct. 1134, 22 L.Ed.2d 442 (1969).

Because many plea agreements will deal with the sentence to be imposed, it will be important, under rule 11, for the judge to have access to sentencing information as a basis for deciding whether the plea agreement is an appropriate one.

It has been suggested that the problem be dealt with by allowing the judge to indicate approval of the plea agreement subject to the condition that the information in the presentence report is consistent with what he has been told about the case by counsel. See American Bar Association, Standards Relating to Pleas of Guilty § 3.3 (Approved Draft, 1963); President's Commission on Law Enforcement and Administration of Justice. The Challenge of Crime in a Free Society 136 (1967).

Allowing the judge to see the presentence report prior to his decision as to whether to accept the plea agreement is, in the view of the Advisory Committee, preferable to a conditional acceptance of the plea. See

Enker, Perspectives on Plea Bargaining, Appendix A of President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts at 117 (1967). It enables the judge to have all of the information available to him at the time he is called upon to decide whether or not to accept the plea of guilty and thus avoids the necessity of a subsequent appearance whenever the information is such that the judge decides to reject the plea agreement.

There is presently authority to have a presentence report *prepared* prior to acceptance of the plea of guilty. In *Gregg v. United States*, 394 U.S. 489, 89 S.Ct. 1134, 22 L.Ed.2d 442 (1969), the court said that the "language [of rule 32] clearly permits the preparation of a presentence report before guilty plea or conviction * * * ." In footnote 3 the court said:

The history of the rule confirms this interpretation. The first Preliminary Draft of the rule would have required the consent of the defendant or his attorney to commence investigation before the determination of guilt. Advisory Committee on Rules of Criminal Procedure, Fed.Rules.Crim.Proc., Preliminary Draft 130, 133 (1943). The Second Preliminary Draft omitted this requirement and imposed no limitation on the time when the report could be made and submitted to the court. Advisory Committee on Rules of Criminal Procedure, Fed.Rules.Crim.Proc., Second Preliminary Draft 126-128 (1944). The third and final draft, which was adopted as Rule 32, was evidently a compromise between those who opposed any time limitation, and those who preferred

that the entire investigation be conducted after determination of guilt. See 5 L. Orfield, Criminal Procedure Under the Federal Rules § 32.2 (1967).

Where the judge rejects the plea agreement after seeing the presentence report, he should be free to recuse himself from later presiding over the trial of the case. This is left to the discretion of the judge.

* * *